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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-588

STATE OF WASHINGTON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

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No. 75-592

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 35-56),[1] is reported at 520 F. 2d 676. The order amending the opinion is set forth at Pet. App. 57-58. The opinion, findings of fact, conclusions of law, injunction and interim plan and stay order of the district court are reported at 384 F. Supp. 312. The opinion alone is reproduced at Pet. App. 59-92.

## JURISDICTION

The judgment of the court of appeals was entered on June 4, 1975, and a timely petition for rehearing was denied on August 4, 1975. The petitions for a writ of certiorari were filed on October 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the courts below correctly declared the treaty rights of the plaintiff tribes.

2. Whether the injunction framed by the district court was an appropriate remedy for the continuing violation of treaty rights that it found.

3. Whether the decision of the court of appeals infringes the Convention of May 26, 1930 (50 Stat. 1355) between the United States and Canada.

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[1] Unless otherwise noted "Pet. App." refers to the Appendix to the petition in No. 75-588, *State of Washington, et al.* v. *United States of America.*

4. Whether the decision of the court of appeals conflicts with the decision of the Washington Superior Court on remand in *State of Washington* v. *Puyallup Tribe, Inc.*, No. 158069, April 8, 1975, and if so, whether review by this Court is appropriate at this time.

5. Whether the evidence supports the findings by the district court that non-Indian reef-net fishermen have pre-empted the usual and accustomed grounds and stations of the Lummi tribe.

## TREATIES INVOLVED

The treaties involved are the Treaty of Medicine Creek (10 Stat. 1132); the Treaty of Point Elliott (12 Stat. 927); The Treaty of Point no Point (12 Stat. 933); The Treaty with the Makahs (12 Stat. 939); The Treaty with the Yakimas (12 Stat. 951); and the Treaty of Olympia (12 Stat. 971). With immaterial variations these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: * * *.
>
> ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

## STATEMENT

### 1. The commencement of litigation and findings of fact.

In September 1970, the United States, on its own behalf and as trustee for several Indian Tribes of the State of Washington,[2] brought this suit against the State to require it to comply with treaties guaranteeing off-reservation fishing rights to the Indian Tribes.

The essential questions to be decided were the measure of the fishing rights provided the Tribes by treaty, whether the then-existing state regulatory scheme infringed upon those rights, and, if so, what relief should be granted.

After extensive pretrial development of the evidence and an 18-day trial, the court entered detailed findings of fact (Findings 1-253, 384 F. Supp. at 348-

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[2] Additional Tribes intervened; the Tribes originally represented by the United States intervened on their own behalf or obtained private counsel. The Washington State Department of Fisheries and Washington State Game Commission, their respective Directors, the Washington Reef Net Owners Association and, in the court of appeals, the Northwest Steelheaders Council of Trout Unlimited, subsequently intervened as additional defendants.

399), which are not contested by the parties [3] and are amply supported by the evidence. Essentially the court found that the treaty Tribes fished for trade as well as subsistence and ceremonial purposes at the time the treaties were made (Findings 2-14, 384 F. Supp. at 350-353). In negotiating the treaties the Tribes were willing to restrict their residence to reservations and were willing to give up claims to large areas of land, but they insisted, and the United States agreed, that they could continue to fish in their usual and accustomed places off the reservations although they would have to share those fisheries with the citizens of the territory (Findings 19-28, 384 F. Supp. at 355-357).

Subsequent to the treaties, the Indians continued fishing on their reservations and at their usual and accustomed places off the reservations, and such fishing "still provides an important part of their livelihood, subsistence and cultural identity" (Finding 31, 384 F. Supp. at 357; Findings 29-34, 384 F. Supp. at 357-358). Many of the Tribes have adopted written fishing regulations for on and off-reservation fishing designed to assure proper escapement (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 159, 160, 190, 384 F. Supp. at 358-387).

The court found that as the number of non-Indian fishermen grew and the State adopted conservation measures, those measures favored non-Indian fisher-

[3] Except those concerning reef-netting near the Lummi reservation, which are contested by the Washington Reef Net Owners Association.

men to the detriment of the treaty-fishermen. More specifically, the court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians" (Finding 193, 384 F. Supp. at 388); that tribal fishermen have avoided using some usual and accustomed fishing places because of State enforcement actions (Finding 33, 384 F. Supp. at 358); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194, 195, 384 F. Supp. at 388).

The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply" (Finding 217, 384 F. Supp. at 393).

There was no showing that the tribal fishing on reservation, which had been free of State control,[4]

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[4] See Pet. App. 66 and n. 2. See also, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557.

had been detrimental to conservation, although many of these reservations straddle the mouths of major river systems, thus making the essential spawning escapement for any run dependent upon passage through them. As to off-reservation fishing the court noted (Pet. App. 77, n. 26):

> With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

**2. The position of the parties, and the relief requested.**

The Washington State Game Commission (Game) argued that except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing at a usual Indian fishing ground) is valid.[5] The Washington State Department of Fisheries, contrary to Game, recognized that the treaties in question provided the Tribes with

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[5] Game, Pre-Trial Br., p. 3; Final Pre-Trial Order, pp. 79, 137; see also Game, C.A. Br., pp. 57, 59, 61.

special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pre-Trial Br., p. 2; Final Pre-Trial Order, pp. 137-138). It contended that its regulations are a lawful exercise of State police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area" (Fisheries Pre-Trial Br., pp. 8, 22; see also p. 2). In its post-trial brief (p. 36) and in argument in the district court (Tr. 4384) Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the Tribes.

The Tribes argued that the State is without authority to regulate their fishing, that the State has no right to permit such heavy fishing by non-Indians before the fish reach the Indians, and the State contrary to the treaties, is preventing the Indians from taking fish necessary to satisfy their needs. They argued that the test under the treaties should be their needs, not a percentage of the harvest, drawing an analogy to water rights in *Winters* v. *United States*, 207 U.S. 564 (see, *e.g.*, Muckleshoot, et al., Pre-trial Br., pp. 8-11).

The United States conceded that the State has the power to regulate off-reservation Indian fishing, but only if it is shown that the regulation is reasonable

and necessary for conservation, meets appropriate standards, and does not discriminate against the Indians by making them suffer the brunt of the conservation measures. The United States argued that Tribes which can show their ability to regulate themselves should be permitted to do so; and that non-Indian fishing should be regulated in such a manner as to permit the Tribes at their off-reservation fisheries the opportunity to catch as many fish as needed to fill their needs, but because of the requirement of fishing "in common with citizens of the Territory," the Tribes, in their off-reservation fisheries, are entitled to not more than 50 percent of the harvestable portion of the runs involved (Respondent's Post-Trial Br., pp. 81-84).

**3. The district court's rulings.**

The district court held that each of the plaintiff Tribes under the several treaties at issue had reserved to itself and its members an exclusive right of fishing within their reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory" (Pet. App. 66). As to the scope of the right the court held (Conclusion 20, 384 F. Supp. at 401):

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exists in part to provide a volume of fish which

> is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[6]

The court further held that the right of a treaty Tribe to take anadromous fish may be regulated by the State, but only if such regulation (a) does not discriminate against the treaty Tribe's reserved right to fish, (b) meets appropriate due process standards and (c) is shown to be both reasonable and necessary to preserve and maintain the resource (Conclusion 29, 384 F. Supp. at 402).

The court also held that the 1937 convention between Canada and the United States did not modify the treaties with the Indians but that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [established by the convention] must comply with regulations of the Commission" (384 F. Supp. at 411).

The court reserved the question of the effect of fish hatcheries (whether Indian, federal, or state) and environmental changes (such as dams) on the fishing rights for a subsequent hearing, preparation for which is now underway (see 384 F. Supp. at 411).

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[6] See also Conclusions 21-29, 384 F. Supp. at 401-402.

**4. The relief granted.**

The court held that in light of the facts found, plaintiffs "are entitled to injunctive relief against the continuation and repetition of acts and omissions which are in violation of the treaty-secured rights of the plaintiff tribes and their members" (384 F. Supp. at 413).

In the injunction the court recognized the overriding authority of the State in preserving the fishery (Injunction, par. 8, 384 F. Supp. at 415) and provided for state emergency regulations over all tribal off-reservation fishing without prior court approval (Injunction, par. 19, 384 F. Supp. at 417). The court, however, provided that Tribes meeting certain standards (Pet. App. 80-81) would be permitted to regulate their own off-reservation fishing subject to monitoring by the State, state emergency regulation, and return to state regulation in case of abuse by the Tribe (Injunction, par. 2, 384 F. Supp. at 414). Tribes not meeting the qualifications would be subject to state regulation in their off-reservation fishing but the State must establish to the satisfaction of the Tribe or, if the Tribe is dissatisfied, the court in advance that its regulations conform to the requirements of the decision (Injunction, par. 3, 384 F. Supp. 414-415).

The court also directed the State to reduce non-Indian fishing of runs that would normally pass through the usual and accustomed off-reservation fishing places of the treaty Tribes to the extent nec-

essary to permit treaty Indians to exercise their fishing rights. In response to requests by both the United States and the State, the court established a formula for determining the maximum extent of the Tribes' entitlement (Pet. App. 84-87; see also Pet. App. 46-50). The formula provides basically that the Tribes are entitled to have the opportunity to fish for up to one-half of any run of fish that normally would pass through their off-reservation sites, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. On-reservation catches are not to be included in the one-half (*ibid.*).

The court directed the state defendants, prior to each fishing season, to obtain data from the Tribes as to the types of gear they expect to use and the quantity of fish they expect to be able to take, and to take account of such information and the limits of the Tribes' entitlement in making its predictions and regulations for the coming season (Injunction, par. 17, 384 F. Supp. at 417). The court also entered an interim plan and stay order for the gradual and orderly implementation of its judgment (384 F. Supp. at 420).

**5. The decision of the court of appeals.**

The court of appeals, in a thorough opinion (Pet. App. 35-56) affirmed. It emphasized that the Tribes, in the treaties giving up their lands, expressly reserved the fishing rights in question and that those rights exist as a matter of federal law. It held (Pet.

App. 42) that the State "[i]n treating Indian fishermen no differently from other citizens of the state * * * has rendered the treaty guarantees nugatory."

Citing *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, the court rejected the Tribes' contention that they could not be subject to state regulation if necessary for conservation; but the court emphasized the burden of the State to show that its regulations, as applied to Indian fisheries, are necessary to conservation (Pet. App. 42-44).

The court further held that the Tribes were entitled to equitable relief (Pet. App. 39). It reviewed and approved the relief granted by the district court (Pet. App. 46-53). The court noted (Pet. App. 46) that "[t]he district court's apportionment does not purport to define property interests in the fish * * *. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run" (emphasis in original). It also noted that (*ibid.*):

> The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

In so holding, however, the court made the important clarification that the adjustment established by the district court for fish taken before they reach the treaty fishing grounds should not take account of fish caught by non-Washington citizens outside the state's jurisdiction (Pet. App. 55). The court remanded the case to the district court's continuing jurisdiction (*ibid.*).

## ARGUMENT

1. The special fishing rights reserved to the respondent Tribes in the treaties in question have been recognized by this Court in *United States* v. *Winans*, 198 U.S. 371, and *Tulee* v. *Washington*, 315 U.S. 681, and, more recently, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (*Puyallup* I) and, after remand, *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (*Puyallup* II). These decisions have made clear at least the following propositions as to treaty protected Tribes:

1. The Tribe has an exclusive fishing right on its reservation.
2. It has off-reservation rights which the State is not free to limit as it can the fishing privileges of other citizens.
3. The State may regulate Indian off-reservation fishing but only if the regulation is necessary for conservation and does not seek to accomplish that conservation goal through imposing unfair sacrifices on Indian fishing for the benefit of non-Indian fishing.
4. Both on and off-reservation rights are reserved rights retained by the Indians in the bargain by which they gave up large areas of land; they must be preserved in a meaningful manner, assuring the Indians their share of the available catch according to a formula to be worked out.

But despite these established principles, the Tribes have been repeatedly deprived of the fishing oppor-

tunities provided them by treaty, as the courts below found. See also *Puyallup* II, *supra*, 414 U.S. at 48. The district court's task in this case was thus, as a court of equity, to establish a remedy that would assure the protection of these rights. Part of the remedy, at the request of the State and the United States, was the establishment of a percentage for determining the fishing opportunity of the Tribes as to the runs that pass through their usual and accustomed grounds. Another part of the remedy was to minimize daily conflict by recognizing the responsibility as well as the rights of the Tribes and the duties of cooperation between the Tribes and the State under overall state control.

The State (No. 75-588, Pet. 11-16) and Northwest Steelheaders (No. 75-592, Pet. 25-30) argue that allowing any Indian self-regulation of off-reservation fishing is in direct conflict with *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556. In that case the Court held that a reservation by the Seneca Nation of a privilege of fishing in a lake on land they had ceded to an individual did not exempt them from state regulations prohibiting spear fishing. The Court emphasized the right of the State to regulate fishing and refused to interpret the treaty as having a contrary intent. The Court pointed out that the regulation applied equally to Indians and non-Indians and thus did not discriminate against the Indians (*id.* at 562).

Here, by contrast, treaties agreed to under different circumstances and containing different language, have been held by this Court to create fishing *rights* which can only be limited if necessary for conserva-

tion of the fishery. The Court has specifically rejected the concept that subjecting Indians and non-Indians to identical state regulation is consistent with the treaties (*Puyallup II*, *supra*, 414 U.S. at 48). Moreover, here, in contrast with *Kennedy*, the courts below found abuse by the State in the substance and enforcement of its regulations. In sum, *Kennedy* was not concerned with, and does not prohibit, the kind of specific relief granted in the particular circumstances, and in light of the history, of this case.

Moreover, unlike the situation in *Kennedy*, the district court here (over the objections of the Tribes), carefully preserved the State's right to supersede tribal regulation. Even the Tribes that qualify as self-regulating have an exemption from State regulation only so long as they continue to meet the qualifications and conditions prescribed in the district court's decision (which include reporting to the State and permitting state monitoring) and are always subject to state emergency regulations.

This limited self-regulation permitted the Tribes is consistent with the district court's findings that the Tribes had not threatened conservation in their previous fishing and that (Pet. App. 77):

> "state regulation of off-reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future."

Nor, contrary to the State's contention (No. 75-588, Pet. 14-16) does this limited self-regulation violate principles of territoriality. The treaties establishing the Reservations provided for the off-reservation fishing rights as part of the same bargain, and those grounds, for fishing purposes, are properly considered as analogous to territorial waters of the Reservations and not extra-territorial. In any event, the Tribes, through custom and later through written regulations, have apportioned and regulated the use of this tribal right by their members. This intra-tribal regulation, at least, is a matter of tribal self-government within the competency of the Tribe (see *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-173) and the Ninth Circuit, in a prior case, specifically held that a Tribe may enforce such regulations against a tribal member by arrest at the fishing grounds. *Settler* v. *Lameer*, 507 F.2d 231.[7]

2. The State argues (No. 75-588, Pet. 16-19) that the district court's restriction of state regulation conflicts with this Court's decisions in *Puyallup I* and *Puyallup II*, as well as earlier decisions, because those decisions upheld the State's police power "to regulate Indian off-reservation fishing provided its regulations were reasonable and necessary for conservation and non-discriminatory" (Pet. 16). In this case, however, the State of Washington's regulation of off-reservation fishing by Indians was neither rea-

[7] Even if that were not so, the regulations could be enforced by denial of tribal fishing rights to errant tribal members, thus subjecting such members to direct state jurisdiction.

sonable and necessary for conservation nor non-discriminatory, but in fact constituted a significant and unwarranted diminishment of the Indians' treaty-guaranteed fishing rights. The district court's remedy, as clarified by the court of appeals, is based on the particular abuses revealed by the evidence. As a pattern of cooperation develops, the decree can no doubt be modified, but at the moment it serves to make real the rights recognized by this Court since 1905 in *Winans* and most recently in the *Puyallup* cases. As Judge Burns stated in his concurring opinion below (Pet. App. 56):

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.[8]

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[8] For the reasons expressed above and in paragraph 1, *supra*, the Northwest Steelheaders argument (No. 75-592, Pet. 30-44) that the decision below violates *Milliken* v. *Bradley*, 418 U.S. 717, is not well taken. First, the remedy does not exceed the scope of the violation of rights found by the district court. The court specifically found that state fishing regulations and enforcement had infringed on the off-reservation fishing rights of the Tribes and the injunction was directed to those violations. Compare *Milliken*, 418 U.S. at 744-745.

Second, the court has carefully *preserved* the overriding regulatory power of the State. The parade of horribles stated by the Steelheaders is entirely unrealistic. The State has not sought to regulate on-reservation fishing; thus the un-

3. The State (No. 75-588, Pet. 19-22) and the Steelheaders (No. 75-592, Pet. 45-51) argue that the courts below should not have "quantified Indian fishing rights in terms of a percentage of the harvest" (No. 75-588, Pet. 19). Yet, as we have discussed (p. 8, *supra*), the State requested such a quantification so that escapement goals could be computed. The State, however, suggested an arbitrary one-third division between treaty fishermen, commercial fishermen and sports fishermen—a division having no connection with the intent or language of the treaties and in effect splitting one party to the treaty into two parties. The district court found, and the court of appeals agreed, that the division supported by the treaty, while necessarily being an approximation, must be based on a 50-50 division of the fishing opportunity for those runs that pass through the usual grounds and stations of the tribe (see Pet. App. 84-87, 47-48).[9]

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realistic fear of Indians blocking a river running through their reservation or stretching a net across the outlet of a fish hatchery on such a river (No. 75-592, Pet. 35-36) is not an issue in this case. Moreover, a state emergency regulation could instantly prohibit such an action off-reservation. Nor is regulation of mesh size, times of fishing, and the like prohibited by the decree where necessary for the conservation of any species, even those not the direct subject of the regulation. (Compare No. 75-592, Pet. 41-44.)

[9] Reservation takes are excluded from this figure because the treaties contemplated exclusive Indian fisheries there; off-reservation ceremonial and subsistence fishing were excluded as *de minimis*. The "equitable adjustment" compensates for fish destined for Indian grounds but caught by non-Indians before they reach those grounds. See Pet. App. 46-50.

But it should be clear that the 50 percent guideline is not a guarantee of any harvest. It is simply a readily understandable measure of what portion of the harvest the Tribes as a group may rightly insist they should have a *chance* to take in variable circumstances. The shares worked out for specific runs in particular years with specific Tribes will vary from the guideline, in accordance with the extent of Indian fishing capability, the size of the run, the degree of Indian and non-Indian interest in the run, and the give and take of cooperative operations (see p. 12, *supra*).

The State argues (No. 75-588, Pet. 21-22) that the decree has "financially destroyed" some non-Indian fishermen and has "seriously depressed" the non-Indian fishing industry. The State refers to no data in support of this. Since there is no evidence that the decree has either increased or decreased the total fishery, it is true that to the extent the Indian catch has increased, the non-Indian catch has been decreased. Nothing suggests, however, that the total Indian fishery involved here has increased even to the one-third suggested by the State. Indeed, to the degree that the Indians are few (see No. 75-588, Pet. 20-21) or poor, their ability to catch a significant percentage of a major run is reduced and the decree is adjustable by their actual experiences (see p. 12, *supra*).

4. The State argues (No. 75-588, Pet. 23-28) that the courts below erred in not declaring that the Convention of May 26, 1930, between the United States

and Canada, 50 Stat. 1355, abolished Indian fishing rights as to Fraser River salmon. The Convention established the International Pacific Salmon Fisheries Commission (IPSFC) as a regulatory body and provided for an equal division of fishing rights as to Fraser River salmon between Canada and the United States.

The decision below presents no issue regarding that Convention requiring further review. Both the district court (384 F. Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.

The courts below also correctly held (*ibid.*) that the Convention did not repeal the treaties with the Indians in regard to Fraser River salmon. Under the Convention and implementing statutes and regulations, the fishermen of the United States are entitled to take one-half of the Fraser River sockeye and pink salmon run. Since the treaties between the United States and the Indian Tribes deal only with rights and powers within the United States' jurisdiction, their provisions can apply only to the United States' half. Nothing in the 1930 Convention, however, conflicts with the Tribes' rights to harvest a fair share of the United States' portion if they are part of the runs passing through the Tribe's usual fishing grounds. Since the Convention is thus not in conflict with the earlier treaties it cannot be held to have tacitly re-

pealed them. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413; *United States* v. *Payne*, 264 U.S. 446, 448; *United States* v. *Lee Yen Tai*, 185 U.S. 213, 221; *Whitney* v. *Robertson*, 124 U.S. 190, 194.

The Steelheaders (No. 75-592, Pet. 51-55), apparently joined by the State (No. 75-588, Pet. 27-28), argue that the decision of the court of appeals sanctions district court interference with the foreign policy of the United States through sanctioning disobedience of IPSFC regulations. This is incorrect. As we have demonstrated, both courts below specifically recognized the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission they are not sanctioned by the decision under review.[10]

5. The Steelheaders argue (No. 75-592, Pet. 56-59) that the Court should grant review to resolve a possible conflict as to rights to hatchery fish between

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[10] Since the decision, the United States through its membership in IPSFC and through diplomatic channels has sought to have the IPSFC alter its regulations to take account of a special Indian fishery within the United States entitlement, by modification of time and equipment requirements adopted for a more efficient commercial fishery. The post-decision proceedings, which the State characterizes as requiring a violation of IPSFC regulations (No. 75-588, Pet. 27-28), are concerned with the same general subject as this negotiation. The State proceeding is described as presently on appeal to the State Supreme Court (No. 75-588, Pet. 27-28), and review here is thus inappropriate. No direct review of the denial of interim relief by the court of appeals has been sought. Moreover, the specific subject of those suits is now moot (see No. 75-592, Pet. 55) and the general issue may be resolved by negotiation within the IPSFC.

the decision below and that of the state court on remand of *Puyallup II*. But as they point out (No. 75-592, Pet. 56-59), the state superior court decision has been appealed to the Washington Supreme Court, which has not ruled on it. Moreover, this is an issue not yet ruled on by the district court or court of appeals in this case (see p. 10, *supra*). Thus any potential conflict (and there may be none) is not ripe for resolution.

6. The Washington Reef Net Owners Association seek review (No. 75-705, Pet. 2) of the single question whether its members are operating in what were, at treaty times, "usual and accustomed grounds and stations of the Lummis." Both the district court and court of appeals have resolved this largely factual question against petitioners and further review is not warranted. The opinion of the court of appeals, at Pet. App. 50-53, fully discusses and properly rejects petitioner's argument.

## CONCLUSION

The remedy provided by the courts below is a careful application of the principles announced by this Court to the detailed facts of this case. It contains its own mechanisms for modification as experience is obtained in its application. For these and the reasons set forth above, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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